

Re-Assessing the Uses of the Resulting Trust: Modern and Medieval Themes

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INTRODUCTION

Ambiguities or gaps can arise when value is exchanged. Property is sometimes incompletely transferred, or transferred to persons who do not exist. Dispositive intentions are formed on the basis of assumptions which prove contrary to the fact. Inexplicable gifts are made by persons who die without making their intentions clear. Presumptions of resulting trust apply in such cases, making assumptions to supply the missing evidence of what transferors intended.

An intention to retain the benefit of property disposed of may be attributed to disponors. Property interests are rearranged so that beneficial interests in the property vest or remain vested in the disponors. Persons who receive property subject to the presumption are made trustees for the persons who disposed of it. Equitable title to the property is said to “result” to the disponors, in an antiquated sense of the word.¹ An elliptical name is given to a circular doctrine. The trust ‘executes’ the presumption that interests in property are intended to be retained or return to persons disposing of the same.

One of the axioms in systems based on English common law is that interests in property are transferred from one person to another through either the exercise of the property owner’s intention, or by act of law.² In order to determine the existence of a dispositive intention, all admissible evidence relevant to the property owner’s state of mind should be weighed.³ It is incorrect to assess whether evidence is sufficient by seeing if it falls within categories which have previously been found to be sufficient for the purpose.⁴ Evidence of dispositive intention knows no categories and is at large.

Transfers of property pursuant to the presumption of resulting trust are based on disponors’ voluntary intentions, despite the *absence* or *insufficiency* of evidence as to what that intention was.⁵ Rule of law supplies the dispositive intent, which is then given proprietary effect by implication of a trust. By contrast, constructive trusts

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¹ *Oxford English Dictionary* (2nd ed, Clarendon Press, Oxford, 1989); ‘**result** v. (ad. L *result-are* to spring or leap back, fr. L *re-re* + *saltare* to leap) . . . **resulting** ppl. a (fr. RESULT v. + ING) arising, produced, or obtained as a result, resultant, consequent . . . **result** sb. (fr. the verb . . .) 1. The action of springing back again to a former position or place. *Obs. rare*’.

² AJ Bradbrook, SV MacCallum, AP Moore *Australian Real Property Law* (2nd ed, 1997), 5–1; MA Neave, CJ Rossiter, MA Stone *Sackville and Neave Property Law Cases and Materials* (5th ed, 1994), 242; D Hayton *Megarry’s Manual of the Law of Real Property* (7th ed, 1993), 116; EH Burn *Cheshire and Burn’s Modern Law of Real Property* (14th ed., 1988), 713–715; EA Francis *Torrens Title in Australasia*, (1972), Vol 1, 6–7.

³ *Davies v The National Trustees Executors and Agency Co of Australasia Ltd* [1912] VLR 397, 403, Cussen J, approved in *Martin v Martin* (1959) 110 CLR 297, 304–305, Dixon CJ, McTiernan, Fullagar and Windeyer JJ.

⁴ *Ibid.*

⁵ GG and GT Bogert *Law of Trusts and Trustees* (revised 2nd ed, 1977) [452]; HF Stone ‘Resulting trusts and the Statute of Frauds’ 6 *Columbia Law Rev* (1906) 326, 329–331.

arise entirely by the operation of law and no intentions need be attributed.⁶ The presumption of resulting trust is a guide drawn from equity's experience of what the transferor's intention was likely to have been. However, facts presumed by resulting trusts are not evidence and the presumption defers to positive evidence of what activated the transferor's mind, however slight it may be. The presumption does not provide a substitute for evidence of intention as a rule of law.⁷

In 1995, resulting trusts were described as a 'landmark' category in the Anglo-Australian private law; yet the principles behind the doctrine have not changed for over four hundred years.⁸ Presumed resulting trusts are associated with a range of self-interested imperatives. There is a 'relative infrequency of gifts' as well as a 'human desire to obtain something of value in return' when property is transferred.⁹ When the facts of a disposition are unclear, people are assumed not to intend the outright transfer of their property. Equitable property rights are formulated accordingly.

This article will outline the modern doctrine and the different rationales which justified it in medieval and modern times. Signs of the continued applicability of the modern rationale will be discussed. Implications will be drawn in order to assess two challenges to the idea; namely, that the presumption of resulting trust is an anachronism and that the resulting trust device can be put to restitutionary use which disregards the presumption.

SURVIVING DOCTRINE AT THE END OF THE 20TH CENTURY

Three species of the presumed resulting trust remain a part of Australian law.¹⁰ Each supplies a means of returning transferred property to its transferor, in the absence of evidence of what that party intended. Inferences are drawn according to the character of certain transactions that persons receiving undivided interests in property are not intended to enjoy beneficial title.¹¹

Voluntary Transfer of Property

Where *personal* property is transferred gratuitously to a stranger, equity presumes that the transferor meant the stranger to have only a legal and not beneficial interest in what is transferred. Benefit of the property is retained by the transferor and the transferee holds the property on resulting trust. Resulting trusts arising on the voluntary transfer of personalty were originally part of a wider canon which applied to the voluntary transfer of land. Equity presumed that land gratuitously conveyed was

⁶ HF Stone, *op cit* (fn 5), 331; cf. HAJ Ford and WA Lee *Principles of the Law of Trusts* (3rd ed, 1996), [2106].

⁷ *Contra Dullow v Dullow* (1985) 3 NSWLR 531, 535, Hope JA; see text at fn.25.

⁸ Deane and Gummow JJ in *Nelson v Nelson* (1995) 184 CLR 538, 548, echoing the words of Eyre CB in *Dyer v Dyer* (1788) 2 Cox 92, 98; 22 ER 42, 45–46.

⁹ Bogert *op cit* (fn 5) [454].

¹⁰ Ford & Lee *op cit* (fn 6) Ch 21; RP Meagher and WMC Gummow *Jacobs' Law of Trusts in Australia* (6th ed, 1996) Ch 12; G Dal Pont and D Chalmers *Equity and Trusts in Australia and New Zealand* (1996) Ch 18.

¹¹ WF Fratcher *Scott on Trusts* (4th ed, 1989) Vol 5 [404.1].

intended to be held in trust for the transferor if the transferor made no explicit disposition of the beneficial interest to the transferee.¹² Resulting trusts referred to what was once a widespread conveyancing practice. Gratuitous transfers of land were common in late medieval England. They were the means whereby express trusts of land were established and trusts were the almost universal way that land was then held.¹³ Land was transferred for no consideration to “feoffees to uses”, for the benefit of the transferors, or as they directed.¹⁴ Conveyances were stipulated to be for the conveyor’s use. When persons conveying the land omitted to stipulate the use, they were taken to be establishing trusts for their own benefit — in the absence of other evidence of dispositive intent. Resulting trusts reflected this assumption. However, over the centuries, conveyancing practice changed and systems of title registration emerged which provided measures of indefeasibility for title-holders which were inconsistent with trusts. Presumed resulting trusts of land became increasingly rare.¹⁵ Eventually the enforcement of voluntary transfer of land for this purpose was acknowledged to be defunct.¹⁶

Gratuitous transfers of personalty continue to attract the presumed resulting trust in Australian law. This is an anomaly, since the analogous resulting trust arising from the voluntary conveyance of land and its rationale have now disappeared.¹⁷ The idea that the property ‘results’ is literally incorrect. Both in the voluntary transfer resulting trust and in other species of the trust, no beneficial interest in the property ever leaves the transferor in order to ‘spring-back’ to him or her.¹⁸ Not all personal property will be impressed with the trust by the voluntary transfer presumption. Personalty must be of a kind whereby ownership and enjoyment may be split, which usually means that the chattels and intangible property transferred must be of the income-earning sort.¹⁹

The presumption of resulting trust can be rebutted. Evidence may be led that the transferor meant to pass a beneficial interest in the personalty to the transferee. Countervailing evidence of a beneficial transfer may be itself presumed by the

¹² Other forms of the resulting trust have analogised from this and the medieval conveyancing practice it reflected. The idea was imported into various American states: see AW Scott ‘Resulting trusts arising upon the purchase of land’ *Harv L Rev* 40 (1927) 669, 669–674.

¹³ Fratcher op cit (fn 11) [440]; *Sanders on Uses and Trusts*. (5th ed, 1844), 17, where it is suggested civil commotions during the reigns of Richard II and Henry IV were connected with the rise of this form of landholding.

¹⁴ See *Dullow v Dullow* (1985) 3 NSWLR 531, 535, Hope JA; FW Maitland *Equity: A Course of Lectures* (2nd ed, revd J Brunyate, 1936) 23–35; W Holdsworth *A History of English Law* (2nd ed, 1937) vol 6, 641–644; SFC Milsom *Historical Foundations of the Common Law* (2nd ed, 1980) 200–239; JL Barton ‘The medieval use’ (1965) 81 LQR 562.

¹⁵ Ford & Lee op cit (fn 6) 9; *Lloyd v Spillet* (1740) 2 Atk. 148; Fratcher op cit (fn 11) [405].

¹⁶ *Conveyancing Act 1919* (NSW), s.44(1); *Property Law Act 1974* (Qld), s.7(3); *Property Law Act 1958* (Vic), s.60(3). Provisions are analogous to *Law of Property Act 1925* (UK), s.60(3):

in a voluntary conveyance a resulting trust for the grantor shall not be implied merely by reason that the property is not expressed to be conveyed for the use or benefit of the grantee.

¹⁷ Fratcher op cit (fn 11) [405] notes that no resulting trust on gratuitous transfer of personal property is now implied in the United States. Continuing United Kingdom enforcement of this trust is said to be based on analogy with the purchase money resulting trust, considered at fn 21.

¹⁸ A form of ‘conceptual thinking about interests outgrowing primitive language forms which concentrate on the movement of tangible assets’: J Hackney *Understanding Equity and Trusts* (1987) 148; see also Meagher and Gummow op cit (fn 10) [1201].

¹⁹ Ford & Lee op cit (fn 6)[2111].

'presumption of advancement'.²⁰ This is in cases where the transferor is related by blood or marriage to the transferee. Equity courts take cognisance either of the legal and moral duties of husbands to support their wives and parents to support their children, or a gift-engendering closeness of relation between these parties.²¹ Nothing ambiguous or incomplete contaminates the transaction.

'Purchase Money' Resulting Trusts

Resulting trusts will be presumed in favour of persons who purchase property and, without apparent reason, direct the vendors to transfer that property into the names of others.²² Several purchasers may provide the purchase money for property in unequal shares. In the absence of contrary evidence, those purchasers will be presumed to intend co-ownership of the property as tenants in common in shares proportionate to the contribution of each.²³ These are the most significant modern applications of the presumption. Land as well as personal property is subject to this application of the doctrine. Equity infers that payors intend no gift or gratuity by their payment of the price. Gratuitous or unequally paying transferees hold part or all of their legal interests in the purchased property in trust for persons paying. Beneficial interests reflect the proportion by which the gratuitously acquired or unequal interests exceed their holder's contribution to the property's price. The rationale of the purchase money resulting trust is the same as that for the voluntary conveyance: donative intent should not be assumed where it is not apparent. Anglo-Australian purchase money resulting trusts were untouched by the decline of the voluntary conveyance resulting trust affecting land and the category has vigour still.²⁴

Failed Dispositions to Express Trusts

This species of the presumption refers to two things. A disposition to an express trust may fail to vest property in the trust. Alternatively, property once vested in a trust is not exhausted by trust purposes. Property transferred to someone who is intended to hold it as trustee will attract a resulting trust if and to the extent that either the trust or disposition to it fails. There are a number of possibilities.²⁵ First, consideration for

²⁰ *Martin v Martin* (1959) 110 CLR 297, 303, Dixon CJ, McTiernan, Fullagar, Windeyer JJ:

It is called a presumption of advancement but it is rather the absence of any reason for assuming that a trust arose or in other words that the equitable right is not at home with the legal title.

²¹ It has not been settled which relationships are included. *Nelson v Nelson* (1995) 184 CLR 538, 547–548, Deane and Gummow JJ, 576, Dawson J confirmed that mothers in addition to fathers are within the presumption as regards property transferred to their children. Still no presumption arises in relation to a de facto wife: *Calverley v Green* (1984) 155 CLR 242 — but see *Napier v Public Trustee (WA)* (1981) 55 ALJR 1, 2, Gibbs CJ. The rationale of this presumption was discussed by Hope JA in *Dullow v Dullow* (1985) 3 NSWLR 531, 536.

²² *Nelson v Nelson* (1995) 184 CLR 538; *Napier v Public Trustee (WA)* (1981) 55 ALJR 1; *Brown v Brown* (1993) 31 NSWLR 582 (CA).

²³ *Calverley v Green* (1984) 155 CLR 242, 246–247, Gibbs CJ, 258, Mason and Brennan JJ.

²⁴ *City of London Building Society v Flegg* [1986] 2 WLR 616 (CA) and cases referred to in fns 21 and 22. In the USA, however, Fratcher op cit (fn 11) [440.2] records that, regarding land, purchase money presumptions of resulting trusts have been abolished in Kentucky, Michigan, Minnesota, New York and Wisconsin. Indiana and Kansas have abolished the doctrine insofar as it has presumptive effect. Constructive trusts are imposed instead where a person uses the money of another to purchase land.

²⁵ *Vandervell v IRC* [1967] 2 AC 291.

creation of the trust may fail. Secondly, beneficiaries may have disclaimed or forfeited their interests. Thirdly, the settlor may not have described any beneficiaries, or done so in inadequate terms. Fourthly, the purposes of the trust may be illegal. Fifthly, where a valid disposition to a trust has been made, the trust purposes may have been already achieved, or impossible to accomplish. Whenever one of these initial or subsequent failures occurs, any property transferred to the trustee (or intended trustee) is held by that person on resulting trust for the transferor. For the recipients in these cases are only intended to receive a legal interest in the property. They would be unjustly enriched if the beneficial interest did not detach.

It has been suggested that trusts resulting from failed trust dispositions are implied by law and not inferred from indicia of the transferor's intention.²⁶ Resulting trusts are here said to be a means of filling the beneficial gaps which occur in the ownership of property which has been transferred. Presumed intention of the transferor is irrelevant to the function of what is presumed.²⁷ This is a 'gap filling' view of the device, concentrating on the remedial effect of the trust's implication and ignoring the presumptive way that it is born.²⁸

WHAT IS PRESUMED BY THE PRESUMPTION OF RESULTING TRUST?

On one view, *an intention to create a trust* is presumed when property is transferred in certain circumstances. On another view, *a negative intention* is presumed: that the transferor does not intend to pass beneficial enjoyment in the property, together with its legal title. The former 'trust-creation' view supposes that transferors intended to impress a trust on property that they transfer in favour of themselves.²⁹ The 'negative intention' alternative, by contrast, presumes that transferors have no intention to pass the benefit of the property that they transferred.³⁰ The doctrine's response therefore is either to a positive intention to bring a trust into existence, or a negative intention, not to make a beneficial transfer of value.³¹ Relative importance of the trust is

²⁶ *Re Vandervell's Trusts (No 2)*, [1974] Ch 269, 290, Megarry J, followed by DJ Hayton *Underhill and Hayton Law Relating to Trusts and Trustees* (15th ed, 1995), 301–312; Ford & Lee op cit (fn 6) [2106]; P Birks *An Introduction to the Law of Restitution* (revised ed, 1989), 63; Dal Pont and Chalmers, op cit (fn 10), 415–417; doubted by Lord Browne-Wilkinson in *Westdeutsche Bank Girozentrale v Islington London Borough Council* [1996] AC 669, 708.

²⁷ *In Re Vandervell's Trusts (No 2)* [1974] 1 Ch 269, 320, Denning MR: said —

A resulting trust for the settlor ... comes into existence whenever there is a gap in the beneficial ownership. It ceases to exist whenever that gap is filled by someone becoming beneficially entitled.

See M Shaw 'Bridging that beneficial gap' [1976] *New Law Jo.* 547, 547 and Bogert op cit (fn 5) [468].

²⁸ See discussion of intention in text at fn 29 and trusts in text at fn 65.

²⁹ W Swadling 'A new role for Resulting Trusts?' (1996) 16 *Leg Stud* 110, 113, adding that the thing presumed could be more accurately called a 'presumed intention resulting trust'; G Dal Pont 'Equity's Chameleon: Unmasking the Constructive Trust' (1997) 16 *Aust. Bar Review* 46, 75.

³⁰ M Morris "Rediscovering the resulting trust: modern manoeuvres for a dated doctrine?" (1983) 17 *Akron Law Review* 43, 46.

³¹ P Birks 'Restitution and resulting trusts' in S Goldstein *Equity and Contemporary Legal Developments* (1992), 362; Birks op cit (fn 26) 63; R Chambers *Resulting Trusts* (1997), 2.

the significant difference between the two variants. 'Trust-creation' makes the trust the central thing presumed. Persons either did or did not intend to bring the legal relation of trust and trustee and consequent property rights into existence. By contrast, the 'negative intention' view of the presumption generates resulting trusts without trust-like relations needing to be conceived. No inference need be made that the transferor so used language or acted that he or she must have had an intention to create a trust.³² Consistently with the negative form of the presumption, transferors might even act in ways inconsistent with trusts existing.³³

The 'trust-creating' explanation has the virtue of better conforming with the history of the resulting trust. We have noted how resulting trusts emerged as a means of overcoming the failure of medieval settlers to specify 'uses' for themselves, in the conveyance of their property to feoffees.³⁴ Implied intentions to create express trusts were given effect to in these situations.

'Trust-creation' also supplies a more coherent explanation of the formation of resulting trusts. Reasons given for the decision in *Westdeutsche Bank Girozentrale v Islington London Borough Council*³⁵ are hard to reconcile with the proprietary basis of the 'negative intention' resulting trust. The Westdeutsche bank had loaned money to the Council pursuant to a contract.³⁶ Unbeknownst to either party, the contract was void from its inception. The money lent was recovered some years later. Then the bank claimed equitable interest on the sum, arguing an entitlement to the money lent under a trust in order to establish a basis for equitable intervention.³⁷ As this was put before the House of Lords, the bank 'retained' an equitable title in the money even after the borrower had been paid – because the bank 'only intended to part with its beneficial ownership of the moneys in performance of a valid contract'.³⁸ Voidness of the underlying transaction was alleged to preserve the payor's equitable title.

Lord Browne-Wilkinson denied that beneficial title could be 'retained' in this way. Persons solely entitled to full and undivided legal and beneficial ownership of property did not enjoy equitable interests in that property. Prior to separation of legal and equitable estates, there is no separate equitable title. The question, he said, was whether in the circumstances a trust giving rise to equitable interests had been created, not whether the same interests had been 'retained'.³⁹ For legal and beneficial interests in property transferred must be split before the transferor of it can purport to 'retain' or 'withhold' a beneficial interest in the property.⁴⁰

³² Ford & Lee op cit (fn 6) [2100]; regarding this inference see *Brisbane City Council v Attorney-General (Qld)* [1979] AC 41, 421 (PC); *Registrar of the Accidents Compensation Tribunal v FCT* (1993) 178 CLR 145, 165, Mason CJ, Deane, Toohey and Gaudron JJ.

³³ See text below at fns 110–111.

³⁴ See text above at fn 13.

³⁵ [1996] AC 669 per Lord Browne-Wilkinson, Lords Slynn and Lloyd agreeing.

³⁶ The loan was in form an 'interest rate swap', the 'practical effect' of which was 'a form of borrowing', uninhibited by statutory controls: see *Westdeutsche* [1996] AC 669, 680, Lord Goff. [1994] 1 WLR 938 (Dillon, Leggatt and Kennedy LJJ), affg [1993] 1 Bank LR 1 (Hobhouse J)

³⁷ [1996] AC 669, 706, Lord Browne-Wilkinson.

³⁸ *Ibid.*, 706, Lords Slynn and Lloyd agreeing. Browne-Wilkinson referred to *Beck v Grant* [1948] Ch 212; *Vandevell v IRC* [1967] 2 AC 291, 311, Lord Upjohn, 317, Lord Donovan; *Commissioner of Stamp Duties (Qld) v Livingstone* [1965] AC 694, 712 (PC). See also *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties* (1982) 149 CLR 431, affg [1980] 1 NSWLR 510 (CA); Chambers op cit (fn 31) 51–55.

⁴⁰ [1996] AC 669, 706, Lord Browne-Wilkinson.

'Negative intention' explanations seem to employ a similar fiction to the one which Lord Browne-Wilkinson disapproved. Beneficial interests in property are retained in transactions where the property is transferred *in gross*. However, inappropriateness of the negative intention to explain generation of the resulting trust does not disqualify it as the correct presumptive inference to draw. Presumptions of resulting trust and resulting trusts which effectuate those presumptions are two different things. Non-beneficial transfer is the governing idea of the presumed intent, whilst the resulting trust is generated in other ways.⁴¹ Transferors are presumed to intend the preservation of their wealth. The presumption is 'executed' by inference of a trust. If resulting trusts are an inference from intention, they are not themselves intended. Intended trusts are express and not resulting.⁴² The resulting trust is adjudicial — operationally more akin to the constructive trust.⁴³

For each of the different explanations of the presumption there are corresponding ways in which the presumption can be rebutted.⁴⁴ Strong views have been expressed on which explanation is correct, because of the bearing that these had on the outcome of the *Westdeutsche* litigation. Peter Birks promoted the negative intention idea when he argued that the resulting trust responds to non-beneficial transfer of property.⁴⁵ 'In modern times', said Birks 'a technical presumption of an intent to create a resulting trust is plainly nonsense.'⁴⁶ Presumptions derive their sense and justification by reflecting the mores of the age. 'Trust-creation' is an intent which can scarcely be attributed to the generality of mankind. William Swadling, however, took the opposite stance. He said that the presumption of resulting trust arising in case of a transfer of property without consideration is not one of non-beneficial transfer. Instead it is 'a presumption of transfer on trust for the transferor'. It follows from this that evidence of intention to benefit the transferee is not the only thing capable of rebutting the presumption. 'Any evidence which is inconsistent with the implication of an intended trust will do'.⁴⁷ Swadling thus adopted the trust-creating explanation. A corollary of this is that a mistaken transfer, or one for which the consideration fails, also rebuts the resulting trust. Both of these events, on the trust-creation view, are within the class of evidence inconsistent with resulting trusts.

The 'negative intention' provides by far the better explanation. The role of the resulting trust presumption is to undo gratuitous transfers of property, where no gift

⁴¹ Birks in Goldstein op cit (fn 31) 361–2; Chambers op cit (fn 31), 20; see below at fn 64.

⁴² Intended trusts are express and not resulting: see below, at n. 80; but cf *Westdeutsche* [1996] AC 669, 708, Lord Browne-Wilkinson:

Both types of resulting trust [purchase money and failed trust dispositions] are traditionally regarded as examples of trusts giving effect to the common intention of the parties. A resulting trust is not imposed by law against the intentions of the trustee (as is a constructive trust) but gives effect to his presumed intention.

This follows the reasoning of Lord Bridge in *Lloyds Bank plc v Rossett* [1991] 1 AC 107, 128–9 and Lords Reid and Dilhorne in *Gissing v Gissing* [1971] AC 886, 896, 900. However, perhaps the 'presumed intention' should be that of the transferor alone and not a common intention held jointly by the transferor and the defendant transferee. This is consistent with the point of the doctrine being to restrain transferees, rather than perfect their self-interested intentions.

⁴³ See *Re Vandervell's Trusts (No 2)* [1974] 2 Ch 269, Megarry J, approved in *Ford & Lee* op cit (fn 6), [2101], Chambers op cit (fn 31) 3.

⁴⁴ See text below at fn 103.

⁴⁵ P Birks in Goldstein op cit (fn 31) 362.

⁴⁶ P Birks 'Trusts raised to reverse unjust enrichment: the *Westdeutsche* case' [1996] RLR, 18.

⁴⁷ Swadling op cit (fn 29) 116–117.

or alternative return is shown to be intended.⁴⁸ In the absence of legislative vesting power, dispositions are reversed through creative use of equitable interests. Origins of the presumption are medieval and so is the device which gives it effect. This, at least, imparts a certain consistency to the negative variant of the presumed intention. Trusts themselves are not the subject of presumed intention. Only the retention of property rights is presumed to be intended. Pre-eminence of the non-beneficial transfer explanation and the 'negative intention' is illustrated by the following recent cases.

First *Brown v Brown*,⁴⁹ which involved a widowed mother and her two sons. The mother argued that a purchase-money resulting trust arose to protect her transfer of 'the greater part' of the assets that she possessed when her husband died. In 1958 Mrs Brown paid almost half of the purchase price of a dwelling house in which she and her family went to live. Title to the house was registered in the names of her sons. A family dispute occurred years later. Mrs Brown asserted that she had been unaware in 1958 that her sons had become registered proprietors of the house. She sought a declaration of her beneficial part-ownership of the house — in the proportion of her original contribution to the house's purchase price.

Salient points about the presumption were evident in this claim. For one, resulting trust relief may be sought *pro tanto*, proportional to the size of an interest claimed, or its duration.⁵⁰ Scott observes that purchase money resulting trusts do not normally arise in favour of persons who make 'general' or 'indefinite' contributions to a price, not amounting to an aliquot part.⁵¹ Such claims may more appropriately be satisfied by personal remedies or equitable liens over the land.⁵² Gleeson CJ ignored these possibilities when he gave judgment for Mrs Brown. He quoted Deane J in *Calverley v Green* for the proposition that the only inference of what one of two or more persons intended, when they unequally contributed to the purchase price of land, was that legal title should be held in favour of persons providing the price in the shares in which they did.⁵³

Brown's case also highlights that the transferor's intention must be consulted at the time of the purchaser's payment of the property's price.⁵⁴ This points to the transactional and retrospective character of the presumption. The intention to be presumed is the one which the disponent had at the time when the property was acquired. Hence in *Brown* it was irrelevant that the sons were in the building trade and had added considerable value to the house by their subsequent renovations and extensions.⁵⁵

Most of the judgment of Gleeson CJ in *Brown's* case did not concern the applicability of the resulting trust presumption. Rather, the issue was whether the presumption was rebutted in one of the following ways. The sons argued that presumed

⁴⁸ Examples of 'alternative return' are given in the text at fn 144; cf. the view of P Birks in "Equity in the Modern Law: an Exercise in Taxonomy" (1996) 26 *UWALRev* 1, 94.

⁴⁹ (1993) 31 *NSWLR* 582, Gleeson CJ, Cripps J agreeing.

⁵⁰ *Napier v Public Trustee (WA)* (1981) 55 *ALJR* 1 — resulting trust of reversionary interest claimed.

⁵¹ Fratcher op cit (fn 11) [454].

⁵² *Ibid.*

⁵³ (1993) 31 *NSWLR* 582, 585, Gleeson CJ, quoting (1984) 155 *CLR* 242, 266–267, Deane J.

⁵⁴ *Lloyds Bank v Rossett* [1991] 1 *AC* 107, 128–129, Lord Bridge; J Riley 'The property rights of homemakers' (1994) 16 *Sydney Law Rev* 412, 417.

⁵⁵ (1993) 31 *NSWLR* 582, 585, Gleeson CJ.

intent was displaced by an intention common to themselves and their mother at the time that the price was paid that the house was to be absolutely transferred to the sons. This defence was found to be contrary to the facts; as well it may have been a confusion of resulting and constructive trusts.⁵⁶ Alternatively, the sons argued that a presumption of advancement arose as between themselves and their mother, rebutting the resulting trust presumption and leading to the contrary inference that the mother intended them to have full legal and beneficial ownership. Chief Justice Gleeson recognised that authorities were divided on the question. Presumptions of advancement, he said, did not unquestionably apply as between mother and child, as they did between father and child.⁵⁷ Indications from the United States in the preceding twenty years were that the presumption extended to mothers and their children in a number of jurisdictions.⁵⁸ However, in this case Mrs Brown's intention was to be presumed at the time that the purchase price was paid in 1958. Applicability of the advancement presumption thus depended on whether it did or should have extended to mothers and their children in 1958. This was an equivocal matter. The issue was by-passed by a finding that any presumption of advancement applicable was rebutted by the objective circumstances of the exchange. It was improvident, the Chief Justice concluded, for a widowed mother of modest means to contribute so large a proportion of her assets to a house to be vested in her 'adult, able-bodied sons'. So the presumption of advancement was factually displaced.⁵⁹

The conclusion drawn from inapplicability of the presumption of advancement was that the primary presumption of resulting trust applied. This is what concerns us here. Without any finding that thirty-five years earlier she had intended a trust to come into existence, Mrs Brown was declared to be entitled to the *pro tanto* resulting trust claimed. The only intention that the presumption concerned was whether the mother intended in 1958 that the sons should have the benefit and enjoyment of the property. A "negative intention" was inferred. No intention to create a trust, or simulacrum of a trust was relevant at all.

Kirby P dissented in *Brown's* case and denied that the mother was entitled to an interest in the house under a resulting trust. Most of his reasoning was based on the different qualities of evidence advanced for the mother and her sons.⁶⁰ He also disapproved of the trial judge's view that equitable presumptions were applicable to the case. There was, Kirby P said,

a very strong likelihood, in the medical evidence which was available, that [the mother's] affidavit did not represent the unassisted recollection of this elderly and ill woman of events so long in the past.⁶¹

A possibility of concoction existed in this view. Evidence of dispositive intent was unreliable.

⁵⁶ (1993) 31 NSWLR 582, 589.

⁵⁷ (1993) 31 NSWLR 582, 590–591.

⁵⁸ (1993) 31 NSWLR 582, 591, referring to Fratcher op cit (fn 11) [442].

⁵⁹ (1993) 31 NSWLR 582, 591.

⁶⁰ Kirby P's view was that the presumption of advancement had been negated by questionable findings of fact made by the trial judge: (1993) 31 NSWLR 582, 591.

⁶¹ *Id.*

This is a strange reason for excluding the presumption. Absence or unreliability of evidence as to dispositive intent is where the resulting trust exercises its normal function. Equity's own intuition is substituted for equivocal conclusions drawn from the facts. Perhaps the disponent has a motive to distort the facts. Perhaps he or she is unlikely to recollect a distant state of mind. In the absence of further evidence, equity presumes that persons in the position of Mrs Brown would self-interestedly intend to retain a beneficial interest in any house purchased with their funds. If the presumption is inapplicable to these facts, it should possibly be challenged on a more explicit basis. Either *what* is presumed is contrary to common understanding, or presumptions, in principle, are never of assistance.

*Nelson v Nelson*⁶² is another case which instantiates the 'negative' variant of intention in a 'purchase money' presumption. Mrs Nelson paid the price for a house which was transferred into the names of her son and daughter. In this she was found to have the intention of enabling herself to obtain a second house with the benefit of an advance under the *Defence Services Homes Act 1918*. Section 23 of that Act provided that Mrs Nelson would be ineligible for an advance if she owned a house other than the one for which the subsidy was sought. Mrs Nelson did receive the subsidised advance, by falsely declaring that she did not own or have a financial interest in any other house. The first house was then sold and domestic discord arose. Mrs Nelson claimed against her son and daughter that she was entitled to the house's proceeds of sale by virtue of the presumption in her favour. A 'purchase money' resulting trust was asserted over the house and its sale proceeds. No evidence of an intention to create a trust was tendered to the Court, nor any inference of the same contended.

By way of defence, the children alleged that the resulting trust presumption was rebutted by a presumption of advancement in their favour. Mrs Nelson was argued to be precluded from rebutting the presumption of advancement because revelation of her illegal behaviour would be entailed. Issues as to the gravity of Mrs Nelson's deception and its proportionality to the value of the first house were said to be irrelevant. Members of the Court denied, as a general proposition, that 'the loss lay where it fell'. Illegality did not have a blanket preclusionary effect. Instead, the majority held that Mrs Nelson was only disabled from rebutting the presumption of advancement to the extent necessary to satisfy the policy of the statute contravened. Upon her repayment to the Commonwealth of an amount equal to the benefit of the subsidised advance for the second house, Mrs Nelson was permitted to enforce her resulting trust interest over the proceeds from the sale of the first house.⁶³ Dawson J upheld Mrs Nelson's claim on the basis that the mother did not need to rely on fraudulent aspects of her conduct in order to defeat the presumption of advancement,⁶⁴ whilst Toohey J found that the policy of the Act did not affect the ownership of houses obtained through misuse of a subsidy.⁶⁵

⁶² (1995) 184 CLR 538.

⁶³ (1995) 184 CLR 538, 571–572, Deane and Gummow JJ, citing *Re Torrez* 827 F 2d 1299 (9th Cir) (1987); *Ex p Yallop* (1808) 15 Ves Jun 60; 33 ER 677, 680 and *Worthington v Curtis* (1875) 1 Ch D 419; 617–618, McHugh J; see P Butler 'Illegally tainted transfer and resulting trusts: *Nelson v Nelson*' (1996) 19 *Univ of Qld LJ* 150, 154–155.

⁶⁴ (1995) 184 CLR 538, 581, Dawson J.

⁶⁵ (1995) 184 CLR 538, 593–594, Toohey J.

Justices Deane and Gummow directly addressed the question of what intention was to be ascribed to Mrs Nelson in connection with her payment of the first house price. Mrs Nelson was treated as having

no intention to confer on her children any beneficial interest in [the first house] or in the proceeds of sale ... Rather, the question is whether a joint owner of the legal title to land is able to resist, by reason of illegality, the assertion of a beneficial title arising as a resulting trust.⁶⁶

This buttresses the negative intention rationale. Presumptions of resulting trust and advancement operate if and to the extent that there is no evidence of the intention of the person who provided the purchase funds. Both presumptions yield to any affirmative evidence of the purchaser at the time.⁶⁷ Also, it may be inferred that a purely negative intention on the part of Mrs Nelson as disponor was sufficient to work the separation of legal and beneficial titles to the first house and its sale proceeds.

Purchase Money Resulting Trusts: Significance of the Trust

Claims of the parties relying on resulting trust presumptions in *Brown's* and *Nelson's* cases were upheld and expressed as equitable interests in the subject property. Neither Mrs Brown nor Mrs Nelson was shown to have had an intention to create the resulting trusts decreed. Trusts were inferred instead from what these women did not intend. Each woman may well have been surprised if told that a trust was implied from her intention. But this should not count against the validity of this explanation. Resulting trusts are never intended. Their character as a species of express trust derives from the implication of intent from surrounding circumstances, rather than what persons said or did.⁶⁸

Resulting trusts are similar in this way to constructive trusts. Both are implied in the absence of trust-creating intention. Constructive trusts are imposed by rule of law. Resulting trusts are implied in the *absence* of a contrary intention. Both categories serve as mechanisms to engender property rights. In earlier times this process was concealed, somewhat as a sleight of hand. Courts then possessed no legislative vesting powers or other means of ordering the transfer of property in order to achieve a just and equitable result. Declarative fiction of the judicial role may have suggested the trust as the appropriate device for altering ownership interests. Though the resulting trust presumption is now to some degree redundant, since statute applicable to matrimonial⁶⁹ and *de facto*⁷⁰ disputes has given the courts a property-redistributive power.

Prior to the *de facto* legislation, Murphy J in *Calverley v Green*⁷¹ found inference of a trust to be the principally objectionable feature of the presumption of resulting trust. *Calverley* concerned the property dealings of *de facto* spouses. A house was

⁶⁶ (1995) 184 CLR 538, 549, Deane and Gummow JJ; see also 576, Dawson J; 583–586, Toohey J.

⁶⁷ (1995) 184 CLR 538, 547, Deane and Gummow JJ.

⁶⁸ See *Re Guinness's Settlement* [1966] 1 WLR 1355, 1362–1363 Goff J; and Hayton, *op cit* (fn 26) 305.

⁶⁹ *Family Law Act* 1975 (Cth) s.79.

⁷⁰ *De Facto Relationships Act* 1984 (NSW), Pt 2; *Property Law Act* 1958 (Vic), Pt 9; *De Facto Relationships Act* 1996 (SA), Pt 3; *Domestic Relationships Act* 1994 (ACT), Pt 3; *De Facto Relationships Act* 1991 (NT), Pt 3. Common law still applies in the other states.

⁷¹ (1984) 155 CLR 242, 264–265 (diss).

purchased and transferred into the parties' joint names. The man provided the deposit out of his own resources and the balance of the price was jointly borrowed. Subsequently, the woman brought proceedings to have the property sold and its proceeds distributed equally, arguing that a presumption of resulting trust arose in her favour. Murphy J treated the trust in an institutional, or substantive, way. Neither party intended a trust to arise, he concluded, hence no trust should be implied.⁷²

A view which is more consistent with contemporary doctrine on the *remedial* role played by the trust in the resulting trust presumption has been expressed in *Gissing v Gissing*⁷³ and *Allen v Snyder*.⁷⁴ In *Gissing*, the House of Lords was concerned with the rights of a former husband and wife whose matrimonial home had been registered in the name of the husband alone. Both parties worked and, beyond a slight contribution to improvement, the wife made no contribution to the purchase price of the house. Her savings were directed instead towards general family expenses. Property rights of the parties had to be determined at general law, since they were divorced prior to the passage of legislation giving the courts power to adjust individually owned assets.⁷⁵ No agreement or inference to the effect that the parties intended that the wife should have a beneficial interest in the house was found. In the result, the husband's legal and beneficial ownership of the house was unanimously confirmed.

The subordinate role of the trust in the resulting trust presumption applied in *Gissing* appears from the way that Law Lords treated the ownership claim of the unregistered wife. Lord Diplock said that:

Any claim to a beneficial interest in land by a person, whether spouse or stranger, in whom the legal estate in land is not vested must be based upon the proposition that the person in whom the legal estate in the land is vested holds it as trustee upon trust to give effect to the beneficial interest of the claimant as cestui que trust. The legal principles applicable to the claim are those of the English law of trusts . . .⁷⁶

Trusts law was the supplier of a property-vesting power. After a fruitless search for a 'resulting, implied or constructive trust' on which to base the wife's claim, Lord Morris concluded that 'any power in the court to alter ownership must be found in a statutory enactment.'⁷⁷

Allen v Snyder involved a property dispute between former de facto spouses.⁷⁸ Male and female parties had lived together for thirteen years. During part of this time they resided in a house owned by the man. The woman made no contribution to the purchase price of the house, though she did assist with the parties' living expenses. For a long time the parties intended and assumed that they would marry when the woman became free to do so. It was agreed that the house would be put in both names on this event. However the parties did not marry when the woman did become free,

⁷² *Ibid* 265.

⁷³ [1971] AC 886.

⁷⁴ [1977] 2 NSWLR 685 (CA).

⁷⁵ *Matrimonial Causes Act* 1973 (UK), s.24(1)(a): to be exercised per s.25(1) 'having regard to all the circumstances of the case'.

⁷⁶ [1971] AC 886, 905–906; Viscount Dilhorne agreeing at 900.

⁷⁷ [1971] AC 886, 898.

⁷⁸ [1977] 2 NSWLR 685 (CA). Comparably to *Gissing*, the case was decided on general principles, as the dispute arose before the court was given statutory property rearrangement power: see now the *Family Law Act* 1975 (Cth) s.79.

or subsequently, and the relationship broke down. The man moved out of the house and the woman continued living there. She defended the man's claim for possession of the house by alleging that, though the legal title was in his name, the beneficial interest in the house was equally shared between them. Justice of Appeal Glass said that this defence raised a 'fundamental doctrine' in property and equity law, applicable to all modern modes of cohabitation. 'Any claim to a beneficial interest in real property by a person in whom the legal title is not vested', he said, 'must be based on a trust.'⁷⁹

Glass JA then separately examined express, resulting and constructive trusts in order to see whether the woman's defence was made out. The resulting trust was of the purchase money species, derived from the woman's contribution to the initial price of the property. He found this not to be established and disapproved of the notion that contributions to the purchase price of property can be generated out of 'common intentions' imputed to the parties.⁸⁰ Resulting trusts, Glass JA said, require 'correspondence between the proportions contributed and the beneficial interests intended'.⁸¹ The idea that contributions can either be based in or varied according to notions of fairness between the parties is artificial:

If . . . the consensus establishes that as between [the parties], the deemed proportions in which they have contributed shall differ from the actual proportions, I cannot see that this arrangement is consistent with the resulting trust. Rather it will operate as a pro tanto rebuttal of the trusts resulting presumptively from the actual contributions . . . Since the respective shares of the spouses may be unrelated to their respective contributions to the purchase price, it is not suggestive of a resulting or implied trust.⁸²

The passage emphasises that the purchase money presumption refers irreducibly to a monetary contribution and correspondence with beneficial interests intended. Considerations of fairness are of no account.

Failure of Dispositions to Express Trusts: Significance of the *Trusts Implied*

Resulting trusts are not appropriate in all cases of failed dispositions to express trusts. In the first place, the resulting trust presumption may be rebutted. Such may appear from an intention to exclude the transferor from the property, to be collected from the initial disposition. Transferors sometimes part with their property out and out. Contributions to raffles, collecting boxes, sweepstakes and entertainments are in this category. Any excess or unused contributions pass to the state as unowned property,⁸³ or the property in the event may be held for the beneficiaries absolutely.⁸⁴

The second reason for exclusion bears more directly on the significance of implied trusts to this species of the presumption. Evidence may appear that the

⁷⁹ [1977] 2 NSWLR 685, 689 (CA), Glass JA, Samuels JA agreeing.

⁸⁰ Ascribed to *Pettitt v Pettitt* [1970] AC 777, 804, 810 and *Gissing v Gissing* [1971] AC 886, 897, 906.

⁸¹ [1977] 2 NSWLR 685, 692 (CA), Glass JA, Samuels JA agreeing.

⁸² *Id.*

⁸³ See the cases cited in fns 118 and 119.

⁸⁴ *Smith v Cooke* [1891] AC 297 — excess property assigned to trustee for creditors divided between creditors; *Re Osoba* [1979] 1 WLR 247 (CA) — property transferred on trust for educating daughter held for daughter absolutely after education completed.

presumption of resulting trust is not applicable otherwise than because of its rebuttal. The transferor of property to an express trust may have intended to create a further express trust over that property in the failed event.⁸⁵ Alternatively, the property's destination upon the failure was contemplated as an additional purpose impressed on the original disposition. Writing in 1914, George Costigan said that it was 'wrong in principle' that 'any inference of trust, ie, any presumption of trust, can have vitality after inference of a trust has given way to *demonstration* of an express trust.'⁸⁶

A small addendum will be made to the now extensive literature surrounding the trusts in *Barclays Bank Ltd v Quistclose Investments Ltd*.⁸⁷ Presumptions of resulting trust, it is suggested, are usually an inappropriate way to describe how trust law responds to failure of a trust expressing the purpose for which money was advanced.⁸⁸ Nothing by way of secondary trust may need to be presumed.

Quistclose concerned a loan made by Quistclose to Rolls Razor for the sole purpose of enabling Rolls Razor to pay a dividend that it had declared, or essentially, money was lent solely for a purpose specified by the lender. Lord Wilberforce concluded from the evidence that:

The mutual intention of (Quistclose and Rolls Razor) was that the sum advanced should not become part of the assets of Rolls Razor, but should be used exclusively for the payment of a particular class of its creditors, namely, those entitled to a dividend (from that company).⁸⁹

A 'necessary consequence' was seen to follow that if the dividend could not be paid, then 'the money was to return to (Quistclose)'.⁹⁰ This arrangement was known to the bank. Rolls Razor had opened a separate account to receive the borrowed funds. Insolvency of the borrower supervened before the dividend was paid and the bank claimed to be entitled to offset the balance in the account against other indebtedness.

Lord Wilberforce denied the bank's claim. Funds in the account were held to be impressed with an implied trust in favour of Quistclose, according to an established principle derived from the bankruptcy jurisdiction.⁹¹ Referring to the 'mutual intention' of the parties that the loan proceeds were to be used for the payment of the dividend, Lord Wilberforce said that

'arrangements of this character for the payment of a person's creditors by a third person, give rise to a fiduciary character or trust, in favour, as a primary trust, of the creditors, and secondarily, if the primary trust fails, of the third person'.⁹²

⁸⁵ Morris op cit (fn 30) 46.

⁸⁶ G Costigan 'The Classification of Trusts as Express, Resulting and Constructive' 27 *Harv L R* 437, 458 (1914) (emphasis in original).

⁸⁷ [1970] AC 567; reference will be made to P Millett 'The Quistclose Trust: who can Enforce it?' (1985) 101 *LQR* 269; C Rickett 'Different views on the scope of the *Quistclose* analysis: English and Antipodean insights' (1991) 107 *LQR* 609 and M Bridge 'The *Quistclose* trusts in a world of secured transactions' (1992) 12 *Ox J of Leg Studies* 333.

⁸⁸ Contrary to the views of most commentators, including Jacobs op cit (fn 10) [1206].

⁸⁹ [1970] AC 567, 580 (other Law Lords agreeing).

⁹⁰ Id.

⁹¹ Millett op cit (fn 87) 270–274.

⁹² [1970] AC 567, 580.

This conclusion has been debated. Whether the lender's right to enforce the arrangement against the borrower should have been characterised as a 'trust', or some lesser species of equitable obligation, may be questionable. Certainly there seems to be little evidence of the intention needed to create an express trust. And who could enforce the trust? Only Quistclose and the shareholders were candidates. Quistclose, however, was disqualified by its character as settlor of the trust and the shareholders were scarcely intended to be beneficiaries, or fulfil any other purpose. All the evidence was to the effect that Quistclose only intended to benefit the trustee.⁹³

Robert Chambers has argued for a negative conception of the lender's right in *Quistclose*, assuming that the right is altogether too exiguous to be classed with that of a beneficiary under a trust.⁹⁴ It is 'something much less and more specific', he says, a condition enforceable in equity in which, 'the borrower is completely entitled to the beneficial use of the money, subject only to the lender's right to prevent its misuse.'⁹⁵ Property deposited for a special purpose with a person who later becomes a bankrupt had to be returned to the depositor when bankruptcy occurred.⁹⁶ No property possessed by the bankrupt passes to the bankruptcy trustee if it is held by the bankrupt on trust for any other person.⁹⁷ Proceeds of a loan made to a debtor on the verge of bankruptcy should therefore not be treated like the debtor's ordinary assets, if the loan is made to pay his or her most pressing creditors or otherwise forestall impending bankruptcy. The money never becomes the property of the debtor in an absolute sense. Instead, the lender is able to restrain the debtor from using the same in a manner inconsistent with the purpose of the loan

The secondary trust for Quistclose Investments as lender is often suggested to be a resulting trust.⁹⁸ Though Robert Chambers adds candidly that

the cases up until *Quistclose* did not specify the nature of the trust and *Quistclose* itself left the classification in doubt.⁹⁹

Trusts based in failure of purposes have been a fertile ground for expanding the competence of the resulting trust. Equity's medieval doctrine has been pressed into restitutionary service. Resulting trusts have been 'integrated' with the 'unjust factors', on which restitutionary plaintiffs rely.¹⁰⁰ Restitutionary responses come to include a proprietary remedy in this way. Yet it is questionable whether any resulting trust in the *Quistclose* case was the 'necessary consequence' of the parties' failing 'mutual intention'. Why should the existence of a resulting trust depend on an

⁹³ Millett op cit (fn 87) 275, 289.

⁹⁴ Chambers op cit (fn 31) 73–77.

⁹⁵ Ibid 76–77. Lord Wilberforce's view that these lender and borrower arrangements 'give rise to a relationship of a fiduciary character, or trust' is implied to be an overstatement.

⁹⁶ *Toovey v Milne* (1819) 2 B & Ald 683; 106 ER 514; *Edwards v Glynn* (1859) 28 LJKB 350; *Re Rogers* (1891) 8 Morrill 243; *Re Drucker (No 1)* [1902] 2 KB 237; see M Hunter and D Graham *Williams and Muir Hunter on Bankruptcy* (19th ed 1979) 279–280 and IF Fletcher *Law of Insolvency* (1990), 195.

⁹⁷ *Bankruptcy Act 1966* (Cth), s 116(2)(a), noted by G Bigmore *Annotated Bankruptcy Act 1966* (1997) 224–225; *Insolvency Act 1986* (UK), s 283(3)(a); noted by Fletcher op cit (fn 96) 195.

⁹⁸ *Re EVTR* [1987] BCLC 646; *Re Australian Elizabethan Theatre Trust* (1991) 102 ALR 681; J Martin *Hanbury and Maudsley's Modern Equity* (15th ed 1997) 50–51; Chambers op cit (fn 31) 83; Birks op cit (fn 45) 16.

⁹⁹ Chambers op cit (fn 31) 83.

¹⁰⁰ Birks in Goldstein op cit (fn 31) 346.

express or implied agreement between Quistclose and the company? Indeed, where the beneficiary of the resulting trust is the settlor entitled to enforce the primary trust, the distinction between the primary and the secondary trust appears to collapse.¹⁰¹

Justice Gummow examined the nature of the 'secondary' trust in the *Quistclose* decision in *Re Australian Elizabethan Theatre Trust*.¹⁰² The 'mutual intention' which created the 'primary trust' for the creditors, he said, was sufficient also to create the secondary trust for the lender. Where the beneficial interest went adequately appeared from the parties' express intention. Justice Gummow said that such a characterisation of what occurred in *Quistclose* is

indicative of an express trust with two limbs rather than an express trust in favour of the shareholders and a resulting trust in favour of Quistclose which arose by reason of an incomplete disposition by Quistclose of the whole of its interest in the moneys lent to Rolls Razor.¹⁰³

No trust need result or be implied on this principle. The implication was excluded by what had been declared.

REBUTTING THE PRESUMPTION

Evidence of the transferor's intention to pass beneficial title in the property to the transferee rebuts a presumption of resulting trust. This is applicable to each surviving species of the doctrine.¹⁰⁴ 'Trust-creating' and 'negative intention' variants of the presumption are negated by this evidence. Sometimes transferring the benefit of property to the transferee is manifestly the point of a transaction. No presumptive inference of intent is then needed. We have noted how the intention of advancement rebutting a resulting trust presumption can be itself presumed.¹⁰⁵ Despite having a dubious juridical nature,¹⁰⁶ presumptions of advancement are frequently argued and upheld in rebuttal of purchase money¹⁰⁷ and voluntary transfer presumptions.¹⁰⁸

The third species of the presumption refers to resulting trusts in favour of settlors upon the failure of dispositions to express trust. This branch of the presumption is rebutted by evidence that settlors intended in the event that the property should be

¹⁰¹ Bridge op cit (fn 87) 352.

¹⁰² (1991) 102 ALR 681.

¹⁰³ Id 691, Gummow J.

¹⁰⁴ *Charles Marshall Pty Ltd v Grimsley* (1956) 95 CLR 353, 364–365 (voluntary transfer of personalty); *Calverley v Green* (1984) 155 CLR 242, 251–252, Gibb CJ, 261, Mason and Brennan JJ, 270–271, Deane J (purchase money resulting trust).

¹⁰⁵ See text at fn 20.

¹⁰⁶ See discussion of *Martin v Martin* (1959) 110 CLR 297 at fn 20.

¹⁰⁷ For example *Nelson v Nelson* (1995) 184 CLR 538 (argued in a transfer from mother to children) *Brown v Brown* (1993) 31 NSWLR 582 (argued in a transfer from a mother to sons); *Calverley v Green* (1984) 155 CLR 242 (argued by female de facto spouse to affect title held by male spouse); *Martin v Martin* (1959) 110 CLR 297 (argued by wife in husband's transfer by direction); *Napier v Public Trustee (WA)* (1981) 55 ALJR 1 (upheld in part on transfer from male to female de facto).

¹⁰⁸ For example *Charles Marshall Pty Ltd v Grimsley* (1956) 95 CLR 353 (upheld in father's voluntary transfer of shares to daughters by allotment from a controlled company – transfer forms in blank signed by daughters – transfers to father's estate completed by executor – presumption applied to original transfer on allotment to daughters); *Stewart Dawson & Co (Vic) Pty Ltd v FCT* (1933) 48 CLR 683 (upheld in voluntary transfer of shares by father of transferees).

held in trust for other purposes, or abandoned.¹⁰⁹ Trustees will be entitled to retain the property free of obligations if the trust instrument can be so construed.¹¹⁰ Interests of the devisees of the land will be accelerated where land is devised subject to fulfilment of a purpose and the purpose fails.¹¹¹

Purchase money presumptions will be rebutted when buyers intend at the time of the direction that the transferees should take the property beneficially.¹¹² Where *some* evidence exists to rebut a presumption of resulting trust, the presumption loses most of its probative value.¹¹³ Courts then examine and assess that evidence as 'a jury question' and give presumptions different weight in different cases. Investments in the name of a solicitor are very likely to be held to be on trust for the persons providing the money invested. In the unlikely event that the solicitor sought to rebut the presumption and prove a gift to him or her, evidence to that effect would have to be strong and independent of the donee. In other cases, investments in the names of others are much more likely to be gifts. Whenever some evidence exists to rebut the presumption, then the presumption is put to one side and the court makes an unaided examination of the facts.¹¹⁴ Only where there is no evidence will the presumption of resulting trust inevitably prevail.

The process whereby a purchase money presumption is rebutted is exemplified by the decision of the High Court in *Scott v Pauly*.¹¹⁵ A mother purchased a house shortly before her death and had it transferred into the name of her daughter, Mrs Pauly. The mother had made an earlier will, which left her real and personal property in trust equally for Mrs Pauly and her two other daughters. Legal proceedings followed the mother's death. The other daughters alleged that Mrs Pauly held the relevant property on trust for the mother's estate. There was, as Isaacs J said, a *prima facie* resulting trust of the house for the mother and judgment must be for the other daughters, 'if nothing more appeared'.¹¹⁶ Mrs Pauly bore the burden of rebutting the presumption.¹¹⁷ Each of the daughters was married and unprovided for except by the will. However, quite different relations existed between the mother and Mrs Pauly, on the one hand, and the mother and the other daughters, on the other. Mrs Pauly alone had assisted the mother in her declining state of health. The contested house purchased by the mother 'in company with Mrs Pauly' was one for which the mother had no use other than as provision for that daughter. And, aside from the house, a 'substantial sum' remained in the mother's bank account for equal division between the sisters. In this way the circumstances of the disposition outweighed inferences drawn from equity's presumption. The species of presumption arising from voluntary transfer is comparably extinguished by evidence that the transferor intended to transfer a beneficial interest in the property concerned.¹¹⁸

¹⁰⁹ Fratcher op cit (fn 11) [412].

¹¹⁰ *Id.*

¹¹¹ *Sidney v Shelley* (1815) 19 Ves 32; 34 ER 549, 1235; Fratcher op cit (fn 11) [412].

¹¹² *Charles Marshall Pty Ltd v Grimsley* (1956) 95 CLR 353; see Ford & Lee op cit (fn 6) [21140]

¹¹³ *Fowkes v Pascoe* (1873) LR 10 Ch App 343, 352, Sir G Mellish LJ.

¹¹⁴ *Ibid* 352-3.

¹¹⁵ (1917) 24 CLR 274, per Isaacs J, Gavan Duffy and Rich JJ agreeing.

¹¹⁶ *Ibid* 281, adding that any presumption of advancement between the mother and the daughter was not of itself sufficient to rebut the presumption of resulting trust 'on the balance of authority as it presently stands'.

¹¹⁷ *Id.*, evidence that Mrs Pauly led was to be 'weighed according to the nature of the case'.

¹¹⁸ *Fowkes v Pascoe* (1875) LR 10 Ch App 343 (transfer of securities to distant relative to whom the transferor acted as parent).

Intention Inconsistent with the Creation of Trusts

Trust-creating intention is possessed by only a small minority of the persons found to be beneficiaries of resulting trusts. Absence of a transferor's intention to create trusts for his or her benefit does not rebut the presumption of resulting trust. Rather, the property transferred has been *abandoned* when a disposition fails and the presumption is factually displaced.¹¹⁹ Between abandonment and the presumed resulting trust there is no middle course. If the disposal is not found to be absolute, then either the property results to the donor, or it goes to the Crown as *bona vacantia*. Displacement of the resulting trust intention is correspondingly uncommon where the presumption is not rebutted.¹²⁰

Does an intention inconsistent with the creation of trusts rebut the resulting trust presumption? The answer must be no. Inconsistency of a transferor's intention with the trust device does not touch what is presumed, assuming that the substance of the presumption deals with the non-beneficial transfer of property and that trusts are merely the vehicle whereby the idea is given effect.

Historical origins of the doctrine, however, do suggest that the inconsistency of intention and trust creation is of more significance. Conveyancing practices in late medieval England gave the trust a more central role in the presumption of resulting trust. The substantive intention of the transferor was then to establish a trust. Voluntary transfers of land and analogous transactions were presumed to be made to the transferor's 'use'.¹²¹ Only the legal interest in property was conveyed to the trustee.

William Swadling argued that these historical facts about conveyancing in the middle ages still govern the substance of the doctrine. 'The presumption of resulting trust', he said 'is a presumption of transfer on trust for the transferor,'

and for that reason, evidence of a positive donative intent is not the only thing capable of rebutting the presumption. Any evidence which is inconsistent with the implication of an intended trust will do, and evidence of a mistaken motive in making an absolute gift falls within that category.¹²²

On this analysis, a corollary of the 'trust-creation' explanation, vitiated or voidable transfers rebut the presumption of resulting trust, in addition to the transferor being shown to intend a beneficial transfer to the transferee.¹²³ Swadling's argument is a direct conflation of restitutionary views. Mistaken transfers and transfers on a failed consideration both exclude the resulting trust on this conception.

¹¹⁹ *Westdeutsche Bank v LBC* [1996] AC 669, 708, Lord Browne-Wilkinson; *Re Producers Defence Fund* [1954] VLR 246; *Re Gillingham Bus Disaster Fund* [1958] Ch 300; see Meagher and Gummow *op cit* (fn 10) [1208].

¹²⁰ See discussions in by Goff J in *Re West Sussex Constabulary Widows Childrens & Benevolent (1930) Fund Trusts* [1971] Ch 1 and Waddell J in *Rees v Dominion Insurance Co of Aust Ltd (in liq)* (1981) 6 ACLC 71.

¹²¹ Swadling *op cit* (fn 29) 115–116, see references cited in fn 13.

¹²² Swadling *op cit* (fn 29) 116–117.

¹²³ Noted in the text at fn 48. Contrary to the 'negative intention' explanation of the presumption promoted in this article, Swadling's thesis about inconsistency with trust-making intention was endorsed by the majority of the House of Lords (without analysis) in *Westdeutsche* [1996] AC 669, 703, Lord Browne-Wilkinson, Lords Slynn and Lloyd agreeing.

Resulting Trusts without the Presumption?

A category of resulting trusts triggered by mistakes and failures of consideration instead of by the presumption has been proposed by some restitutionary theorists.¹²⁴ The innovation has the useful purpose of elevating personal claims arising from the transfer of property into claims with a proprietary status. Specifically, resulting trusts are proposed to apply to cases where property is transferred without the transferor intending to benefit the transferee.¹²⁵ A large and unprincipled addition to equity's competence is thereby made, in that property rights and trusts are suggested to follow the way that property is transferred and not conscientious obligations which bind the holder of the property.¹²⁶ An absence of intention to benefit the transferee which generates the resulting trust could arise through the transferor's drunkenness, coercion, being mistaken or misled, as well as by the effects of trickery and false promises. Nothing about the creation of this new type of trust need proceed from the transferee; he or she need not even be born at the time for the transferor to be attributed with the requisite lack of intention. Transferors, for their part, might fail to possess an intention to transfer through being supine, comatose or deceived. Focus is on the mental state of the transferor and agency of the defendant transferee is ignored.

Allowing a species of resulting trust to exist without the presumption of intention is equivalent to sanctioning the existence of a constructive trust not based in unconscientious behaviour. There is no body of existing doctrine to regulate how such trusts could exist. Surely resulting trusts are not to be based in a proprietary discretion? In *Westdeutsche*,¹²⁷ the bank claimed an entitlement under a resulting trust of just this non-presumptive kind. The trust was said to arise from the circumstances in which the value was transferred. No constructive trust could be maintained in the absence of the defendant's unconscionable conduct. For the Council had no knowledge of the voidness of the loan contract such as would raise a constructive trust before the bank account, into which the moneys were paid, went into overdraft. One cannot be a constructive trustee of an unidentifiable trust fund.¹²⁸ Lord Browne-Wilkinson affirmed that 'the basic premiss on which all trust law is built' is that a putative trustee's conscience must be affected by the factors argued to give rise to the trust. Without this, no trusteeship of whatever kind can arise.¹²⁹ In the case of a presumed resulting trust, the trustee's conscience may be affected by what Lord Browne-Wilkinson referred to as 'the common intention of the parties', though problems with this understanding may exist.¹³⁰ The essence of the matter is that presumptions of resulting trust refer to the voluntary passage of property interests pursuant to a transferor's implied intention.

¹²⁴ Birks op cit (fn 47) 94–96, suggests that resulting trusts might be renamed 'unjust enrichment trusts' when shorn of the presumption; Chambers, op cit (fn 31) 105, 143–170.

¹²⁵ See Birks in Goldstein, op cit (fn 31) 371.

¹²⁶ Contra *Westdeutsche* [1996] AC 669, 709, Lord Browne-Wilkinson.

¹²⁷ [1996] AC 669.

¹²⁸ [1996] AC 669, 707, Lord Browne-Wilkinson: see *Re Goldcorp Exchange Ltd* [1995] 1 AC 74 (PC).

¹²⁹ [1996] AC 669, 709.

¹³⁰ [1996] AC 669, 708. Can the 'guilty conscience' which generates a resulting trust arise as late as when a claim is brought? Property put in the name of a person without that person's knowledge has been held recoverable by a resulting trust: see *Birch v Blagrove* (1755) 1 Amb 264; 27 ER 176; *Childers v Childers* (1857) 1 De G & J 482; 44 ER 810; *Re Vinogradoff* [1935] WN 68; *Re Muller* [1953] NZLR 879, referred to in *Westdeutsche* at 705.

IS THE PRESUMPTION OUT OF DATE?

Some judges in Australian appellate courts have doubted in recent times whether the resulting trust has a role to play in the modern world. The presumption, said Murphy J in *Calverley v Green*, is 'arbitrary', 'disharmonious to justice', 'opposed to a rational evaluation of property cases arising out of personal relationships' and 'inappropriate in our times'.¹³¹ He added: 'the notion that a deliberate act raised a presumption of a trust in favour of the transferor, would astonish the ordinary person.'¹³²

Endorsing these views in *Brown v Brown*, Kirby P said that 'unencumbered reason and logic' based upon 'modern social norms and understandings' provided a better way of construing ambiguous property dispositions.¹³³ Justice McHugh in *Nelson v Nelson* assumed that the 'equitable rule' implying resulting trusts applied to the case.¹³⁴ However, he disapproved of the doctrine in the following terms:

No doubt in earlier centuries, the practices and modes of thought of the property owning classes made it more probable than not that, when a person transferred property in such circumstances, the transferor did not intend the transferee to have the beneficial as well as the legal interest in the property. But times change. To my mind — and, I think, to the minds of most people — it seems much more likely that, in the absence of an express declaration, or special circumstances, the transfer of property without consideration was intended as a gift to the transferee. That being so, there is a strong case for examining whether the presumption of resulting trust accords with the effect of contemporaneous practices and modes of thought.¹³⁵

Two separate criticisms of the resulting trust presumption are made by Justices Murphy, Kirby and McHugh. The first disapproves of the implication of trusts when property is transferred. Only Murphy J clearly makes the point.¹³⁶ The second criticism denies the appropriateness of the presumption of non-gratuitous transfer. We can deal with the first matter shortly. Creation of trusts is not presumed by the presumption of resulting trusts. Trusts are only a device, as was concluded, which facilitate judicial alteration of property ownership in accord with what is presumed. No substantive attack on the presumption can focus on the trust device used for execution of its effect.

Lord Upjohn distinguished the substance of the presumption from the resulting trust device in *Pettitt v Pettitt*.¹³⁷ The following passage from his speech follows a statement of the purchase money rule in *Dyer v Dyer*:¹³⁸

¹³¹ *Calverley v Green* (1984) 155 CLR 242, 264, Murphy J (diss).

¹³² *Calverley v Green* (1984) 155 CLR 242, 265, Murphy J (diss).

¹³³ *Brown v Brown* (1993) 31 NSWLR 582, 595 Kirby P (diss).

¹³⁴ (1995) 184 CLR 538, 600, not acknowledging the demise of the voluntary conveyance of land resulting trust:

When a person (the transferor) transfers property without consideration or purchases property and directs the vendor to transfer the title to another person, equity presumes that the transferee holds the property on resulting trust for the transferor.

¹³⁵ (1995) 184 CLR 538, 602; see also *Dullow v Dullow* (1985) 3 NSWLR 531, 535, Hope JA, observing that the resulting trust is 'completely anachronistic'.

¹³⁶ *Calverley v Green* (1984) 155 CLR 242, 265; approved by Kirby J (diss) in *Brown v Brown* (1993) 31 NSWLR 582, 595.

¹³⁷ [1970] AC 777.

¹³⁸ (1788) 2 Cox 92; 22 ER 869.

It has been said that young people today do not give their minds to legalistic technicalities of advancements and resulting trusts; neither did they in 1788 and it is only because they did not do so then that these presumptions were invented, because that represented the common sense of the matter and what the parties, had they thought about it, would have intended. In my opinion, today the doctrine of resulting trusts still represents the common sense of the matter and what the parties would have agreed had they thought about it.¹³⁹

The 'common sense of the matter' is consistent with the role which it is asserted that trust play within the modern presumption of resulting trust. Trusts do not describe what the presumption is about.

An advocate of the 'trust-creation' variant might say that 'negative intention' has a counter-intuitive ring to it. How can trusts be peripheral to a presumption about when trusts arise? Earlier times in another land and the origins of the idea suggest the centrality of the trust.¹⁴⁰ Such considerations do not count for much in the contemporary (Australian) context. Doctrine has evolved. And there is a significant fact about the area where the presumption of resulting trust is most often invoked. Registrars of interests in land are prohibited in all Australian states and territories from making any entry of trusts in the registers, whether express, implied or constructive.¹⁴¹

The second criticism goes to the heart of the presumption. Should the inference that gratuitous transfers of property are rarely absolute be abandoned? Certainly it is possible that transfers of property are now more likely to be made by way of gift than in earlier times. Social mores have changed.¹⁴² Principles based on more communitarian assumptions may now be needed to temper the rigour of the modern law.¹⁴³

Yet the modern pattern of human property exchange has arguably changed consistently with the 'negative intention' presumed. Motives for taking title in the name of another without intending a gift for that person have become more diverse. Non-donative transfers are often made in arrangements for informal cohabitation.¹⁴⁴ Income-bearing property might be purchased in the name of another (or share allotted) in order to transfer income to that person.¹⁴⁵ Legitimate purchases in the names of others may be made in order to avoid publicity. Purchasers may not want vendors to know of their identity for fear that prices will be raised.¹⁴⁶ Adjoining land is not infrequently bought in this way. Purchase in the name of another may facilitate resale

¹³⁹ [1970] AC 777, 816.

¹⁴⁰ See authorities referred to in fn 14.

¹⁴¹ *Real Property Act* 1925 (ACT), s 124(1); *Real Property Act* 1900 (NSW), s 82(1); *Transfer of Land Act* 1958 (Vic), s 37; *Real Property Act* 1861 (Qld), s 79; *Real Property Act* 1886 (SA), s 162; *Transfer of Land Act* 1893 (WA), s 55; *Land Titles Act* 1980 (Tas), s 132; *Real Property Act* (NT), s 162: see DJ Whalan *The Torrens System in Australia* (1982) 119–120.

¹⁴² Though commentators have not noted any rise in the level of generosity: see Hayton op cit (fn 26) 318–320; Bogert op cit (fn 5) [453]; Fratcher op cit (fn 11) [440]: 'The presumption would seem . . . not to lack justification in ordinary human experience'.

¹⁴³ See M Chesterman 'Equity in the law' in PN Troy (ed) *A Just Society?* (1981) 51, 61; from a feminist perspective, also L Sarmas 'A step in the wrong direction: the emergence of gender neutrality in the equitable presumption of advancement' (1994) 19 MULR 758, 766.

¹⁴⁴ See *Calverley v Green* (1984) 155 CLR 242; *City of London Building Society v Flegg* [1986] 2 WLR 616; *Grant v Edwards* [1986] 1 Ch 638.

¹⁴⁵ *Charles Marshall Pty Ltd v Grimsley* (1956) 95 CLR 353.

¹⁴⁶ Fratcher op cit (fn 11) [440].

of the property where the purchaser is a married man.¹⁴⁷ A person believed to be well suited to undertake the responsibilities of property management is sometimes used as the transferee of property on behalf of another who provides the price.¹⁴⁸ Property may be purchased in the name of a creditor as security for a debt owing by its purchaser.

Other motives for voluntary transfers or purchase in the name of another are of the improper kind. Debtors can hinder, delay or defeat their creditors through use of nominee purchasers of property.¹⁴⁹ Frauds under social security,¹⁵⁰ taxation,¹⁵¹ or veterans' affairs¹⁵² legislation may be facilitated through the denial of the legal ownership of property.

CONCLUSION

Presumptions of resulting trust have two elements. Confusion has followed from failing to see the distinctive role of each. There is, on the one hand, the 'presumption'. This is a negative inference that equity draws in certain dispositions, where the evidence is unclear. On the other hand, there is the 'resulting trust'. This is a device whereby intention inferred by the presumption is carried into effect. Two points have been argued to follow. Firstly, the device is not itself presumed.¹⁵³ Transferors are not presumed to intend to create trusts when they gratuitously convey their property. 'Trust-creating' as a rationale for the presumption offer us only a history lesson. Too many other motives for making gratuitous conveyances now exist.¹⁵⁴ 'Negative intention', the ungenerous assumption that transferors give nothing away without expecting something in return, is the preferable rationale in the modern context. Scrutiny of gratuitous dispositions still seems justifiable on this basis. The second point is that the category of resulting trusts is a small one. It is confined to the facts which trigger the presumption.¹⁵⁵ Effectuating the presumption is the whole point of the resulting trust's existence. The idea cannot be appropriated to plug up the holes in developing theories of the private law.¹⁵⁶ The search must continue for a restitutionary proprietary remedy with an authentic 'proprietary base', now that a high tribunal has said that the resulting trust is unsuitable for the purpose.¹⁵⁷

¹⁴⁷ See *Napier v Public Trustee (WA)* (1981) 55 ALJR 1.

¹⁴⁸ Cf the argument for the defendant in *Brown v Brown* (1993) 31 NSWLR 582.

¹⁴⁹ *Bankruptcy Act* 1966 (Cth), s 121 and *Brady v Stapleton* (1952) 88 CLR 322; *Sharrment Pty Ltd v Official Trustee* (1988) 82 ALR 530; *Re Barnes: ex p Stapleton* (1961) 19 ABC 126.

¹⁵⁰ *Tinsley v Milligan* [1994] 1 AC 340.

¹⁵¹ *Martin v Martin* (1959) 110 CLR 297 (land tax) *Stewart Dawson & Co (Vic) Pty Ltd v FCT* (1933) 48 CLR 683 (income tax).

¹⁵² *Nelson v Nelson* (1995) 184 CLR 538.

¹⁵³ *Contra Swadling op cit* (fn 29) 115–116; *G Dal Pont op cit* (fn 29) 75.

¹⁵⁴ Some are mentioned at fn 144.

¹⁵⁵ *Contra Birks in Goldstein op cit* (fn 31) 368–373; *Birks op cit* (fn 440 16; *Chambers op cit* (fn 31) *passim*.

¹⁵⁶ *Westdeutsche* [1996] AC 669, 716, Lord Browne-Wilkinson.

¹⁵⁷ Lord Browne-Wilkinson in *Westdeutsche* 716, Lords Slynn and Lloyd agreeing; see *Birks op cit* (fn 25) 378 on the restitutionary importance of this search.